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*In the Circuit Court of the City of Richmond, Va.*COMMONWEALTH vs. JOHN CRONIN.¹

1. Where in the course of a capital trial the witness, a Roman Catholic clergyman, was asked in his examination "if Mrs. C. (the deceased person) had not made to him in the sacramental confession, acknowledgments of improper or adulterous intercourse," *Held*, that inasmuch as the witness' knowledge was not obtained in any civil capacity or as a private individual, but in the character of a Roman Catholic minister of the sacrament of penance, a sacrament held by that church to be an inviolable and eternal secret, subjecting the revealer to the severest ecclesiastical punishments in this world, and as he believed, to eternal punishment as a sacriligious violation of his oath, the communication was privileged, and that the witness might decline answering without subjecting himself to an attachment for contempt.
2. As a general principle every person when called upon in a court of justice is bound to testify whatever he may know touching the matter inquired of; a principle, however, subject to certain exceptions, as professional communications made to attorneys, &c.
3. By the language and spirit of the several State and Federal constitutions, it is obvious that religious toleration was one of the great purposes that their framers had in view, and that they were intended to secure forever to all the free exercise and enjoyment of religious profession and worship, and any other construction than one that holds the sacramental confession a privileged communication would be an invasion of the constitutional boon of religious toleration.

John H. Gilmer, for the prisoner.

Marmaduke Johnson, for the Commonwealth.

On the 29th day of August, 1855, Margaret Cronin, the wife of the accused, made complaint before the Mayor of the city of Richmond, against her husband for violently assaulting her, saying "that on the night previous, at a late hour, a man named Byron came to her chamber after she had gone to bed and awoke her by pushing her, when she ordered him out of the room. Soon after, having occasion to go to the water closet, as she went down the steps, she saw Byron standing or sitting on them; she passed him and went in,

¹ We are indebted to the pages of our contemporary "The Quarterly Law Journal," for April, 1856, for this interesting case.

and Byron soon after attempted to enter, through the window or small opening over the door." It was proved that on the night of the 28th of August, the prisoner went about 12 or 1 o'clock to the room of one Edward McSweeney, the brother of Mrs. Cronin, and told him that "he had caught Margaret (his wife) in the privy with a man named Byron. McSweeney went with prisoner back to prisoner's room. When they got in, prisoner and his wife commenced talking together very excitedly; during the conversation, prisoner struck her; soon after, he knocked her down and she lay in a kind of swoon. Witness went directly for the watch, and returning in the course of half an hour, found that the prisoner had dragged or thrown his wife into the street. It was also proved that after being thrown into the street, she arose and attempted to return into the house, but was thrown or kicked back into the street again, and finally got up and went into the next house. Mrs. Cronin's practising physician was called in to see her on the 3d of September, when he found her very ill, and with numerous bruises upon her person. She was pregnant at the time of the injuries received, and during her illness had an abortion. From the 3d of September she grew rapidly worse, and died on the 13th of September. A *post mortem* examination was held on the night of the day on which her death occurred, when it was ascertained that her spleen had been ruptured by a blow, and the opinion of the medical man, Dr. Beale, who conducted the *post mortem* examination, was, that the rupture of the spleen was the immediate cause of her death.

After the introduction of this evidence, the counsel for the defendant introduced as a witness the Rev. John Theeling, who deposed that at the request of the Bishop, he visited Mrs. Cronin, on the 6th of September, in his ministerial character as a priest of the Roman Catholic church. He was not at liberty to say whether he administered absolution, that ceremony coming under the secrecy of the sacramental confession.

In the course of his examination, the witness was asked by the prisoner's counsel, if Mrs. Cronin had made to him, in the sacramental confession, acknowledgments of improper or adulterous intercourse with Byron.

To this question, it was objected on the part of the Commonwealth, that the proper foundation had not been laid, it not having been proved that at the time of such supposed admission, the deceased knew or believed that she was *in extremis*. Dr. Gavenzel was then recalled by defendant, and deposed that on the 6th day of September, Mrs. Cronin seemed very restless and manifested much uneasiness, asked him if he thought she was dangerously sick, and expressed some apprehensions about her recovery. He asked her why she put such questions to him. Her reply was, that if she should be in danger, she would send for the Bishop. Dr. Gavenzel then said that she had better do so, if she thought she would receive any spiritual good. The witness said nothing to create in her mind the impression that she was in a dangerous situation ; and she said nothing that indicated a sense of impending dissolution.

The witness, Theeling, was again introduced, and was asked whether or not Mrs. Cronin was a Catholic. He answered that she was, and that no Catholic ever received the sacramental service of extreme unction, unless they have a serious disease, which may produce death, though perhaps not proximately, but it was the duty of the priest to administer the service before all hope of recovery was past. This ceremony being regarded by the church as having not only a spiritual, but a temporal effect in restoring health, and hence should not be delayed too long. [The witness had said in a former part of his examination that he was sure he had administered extreme unction, though he did not remember it.] That as to what occurred in the confessional or intimately connected therewith, he was not allowed by the rules of the church to intimate, much less disclose. In the sacramental confession, there was no one present but Mrs. Cronin and himself. The former question as to the admission, by Mrs. Cronin, in the confessional, of adulterous intercourse with Byron being then put to the witness, he read, by permission, to the court, the following reasons for refusing to answer the same.

“It is due to this honorable court to state briefly my reasons for not answering the questions proposed by the counsel for the defence, and to hesitate to do so would argue a contempt for the majesty of the law and the dignity of this court, the dispenser of the law.

Were I asked any question which I could answer from knowledge obtained in my civil capacity or as a private individual and citizen, I should not for a moment hesitate, nay more, I would consider it my duty, to lay before this honorable court all the evidence I was in possession of, being mindful of the precept of the apostle, 'Let every soul be subject to higher powers, for there is no power but from God and those that are ordained of God, therefore he that resisteth the power, resisteth the ordinance of God, and they that resist, purchase to themselves damnation,' *Rom. chap. xiii., v. 1, 2.* But if required to answer any question in the quality of a Catholic minister of the sacrament of penance, when I believe God himself has imposed an inviolable and eternal secrecy, I am bound to be silent, although instant death were to be the penalty of my refusal. The question proposed by the counsel for the defence affects me in my latter capacity, and hence I must decline to answer it; whilst in so doing, I most respectfully disclaim any intention of contempt or disrespect, directly or indirectly, to this honorable court. Is a Catholic priest ever justified under any circumstances in revealing the secrets of the sacramental confession? I answer, No. That no power on earth, *civil or ecclesiastical, spiritual or temporal,* can ever, under any circumstances, dispense with this perpetual obligation of secrecy, so that were Pope Pius the IX. in this court, and if I can suppose for a moment, he should so far abuse his sacred authority, and in the plenitude of that authority, as my first spiritual superior on earth, should request, admonish and command me to answer the question proposed, my answer would be to *him* what it was to the prisoner's counsel.

I can say nothing about the matter. The law which prohibits me from revealing what I learn in the sacramental confession, Catholics believe to be *divine*, and emanates from our Lord himself. It is a tenet of the Catholic church, that Christ instituted seven sacraments, neither more nor less. *Con. Florent. in Decret's ad Armenos, Con. Tirdent, Sess. 7, Can. 1.*

It is also an article of Catholic faith that penance is one of those sacraments instituted by Christ for the remission of sins committed after baptism. *Con. Tirdent, Sess. 14, Can. 1.*

And that sacramental confession forms an essential and component part of this sacrament. Further, that the obligation of secrecy is especially connected with the *divine* institution of confession. For if it would be lawful for a catholic priest in any case to reveal what was certified to him in confession, the divine precept of confession would become merely nugatory, and there is no person who would be willing to disclose to a priest an occult sin, which could be made public and blacken his fair name. Such a revelation, if permitted, would be destructive of the divine precept of confession.

But as we cannot suppose that Christ, the eternal Wisdom of the eternal Father, would pull down with one hand what he had erected with the other, and as we Catholics believe he instituted sacramental confession—and for the practice of confession, secrecy is absolutely necessary—we conclude that inviolable secrecy is commanded by our Lord in the obligation of confessing our sins. If then, I were so forgetful of the solemn obligations not arising simply from ecclesiastical but from the divine law, not from man but directly from God—as to answer the question proposed, I should be forever degraded, rendered infamous in the eye of the Catholic church, shunned by every Catholic, and I believe by every honorable man, no matter how far his religious opinions and mine might differ. Shunned and rendered infamous as a sacrilegious wretch, who had trampled on his most holy and solemn obligations and violated the sacred laws of nature, of his God and of man. I would be forever deposed from the sacred ministry, and where the *Canon* law forms part of the civil law, be condemned to perpetual imprisonment in a monastery, there to repent during my life the horrid crime I would have committed. 4 *Con. Lateran*, *Can.* 21. But what is still more than all, I would violate the dictates of my conscience, that stubborn monitor, whose voice would forever whisper to my soul black and dire sacrilege. I might endeavor to smother its cry, but all my attempts would only add strength to its terrible reproaches and warnings. ‘You have committed sacrilege of the deepest dye—sacrilege to be punished forever, by the eternal vengeance of a just and offended Deity.’ I have endeavored thus to state my reasons as clearly as I could for not answering the question pro-

posed. I thank this honorable court for the kind and patient hearing which it has extended to me. Whatever may be its decision, I shall receive it with respect."

An answer being insisted on, and objection being made by the witness for the reasons stated by him in the paper read, and filed in the cause, and the question having been elaborately argued by the counsel on both sides, the court took time to consider.

At the meeting of the court, on Monday, it was held that the question was improper—the counsel for the defence having laid no foundation for introducing the statement of the deceased, by showing that at the time of making the supposed statement she was conscious of her dying situation. At the close of the opinion upon this point, in consequence of some observation which fell from the court, the counsel for the prisoner remarked that the witness Theeling would not state what occurred in the confessional as to Mrs. Cronin's apprehension of death, and stated that he would ask of the witness the distinct question, "whether in the confessional Mrs. Cronin did not express to him (witness) her apprehension that she was in a dying condition," and desired the court to consider the question as propounded, and asked the opinion of the court upon the question, as it was his purpose to recall the witness, and thereupon the court having fully considered the whole subject, ruled the question to be improper, and delivered the following opinion :

MEREDITH, J.—If the witness be asked what the deceased stated touching her apprehension of death during the administration of the sacrament of penance, it necessarily raises the question of privilege which was so fully discussed before I adjourned the court on Saturday ; and as the counsel has announced his purpose to propound the question when the witness is recalled, and has asked me to pass upon its competency, I will briefly assign the reasons which have led to the decision I have formed on an examination of the subject. The question then is, whether a Roman Catholic priest shall be required to disclose what he has received in the sacramental confession ? This disclosure, the Rev. Mr. Theeling, the Romish priest, has declined making, and in courteous and respectful terms has assigned the reasons which control his conduct. He has not hesitated

to give all the evidence he knows as a private individual, and which he has obtained from those ordinary sources of information from which other witnesses derive theirs. It is only the secrets of the sacramental confession, and information entrusted to him in the sacred tribunal of penance, that he declines to reveal.

It is a tenet of the Roman Catholic church, that Jesus Christ, the divine author of Christianity, has instituted seven sacraments, that the sacrament of penance, of which the sacramental confession is a component part, is one of these seven sacraments; and it is a doctrine of that church, that the same divine author of these sacraments has laid the obligation of a perpetual and inviolable secrecy on that sacrament, and this obligation is enforced by an oath administered at the time of ordination.

Should the witness make the disclosure required of him, he would subject himself to the most serious penalties known to his church. 1. He would forever degrade himself in the eye of the Catholic church. 2. According to the canons of that church he would be divested of his sacerdotal character, replaced in the condition of a layman, and be forever disabled from exercising any of the ecclesiastical functions. 3. That if he lived in a country where the canon law prevailed, he would be liable to be lodged in close confinement to do penance for the rest of his life. 4. According to the dictates of his own conscience he would render himself guilty, by such a disclosure, of everlasting punishment in the life to come. Such would be the consequences to the witness according to the recognized rules of his church.

I shall not pause to discuss how far those common law rules of evidence, which exempt a witness from answering questions, whose direct tendency is to degrade his character, expose him to a criminal question, or subject him to a pecuniary forfeiture. I do not think them applicable to this case. I cannot however, close my eyes to the dreadful predicament in which the witness stands; if he tells the truth he violates his ecclesiastical oath. If he prevaricates he violates his judicial oath. If he answers yes, *punished* by the ecclesiastical law. If he answers no, *punished* by the municipal law. If he answers yes, *punished* by ecclesiastical degradation.

If he answers no, *punished* for judicial contempt. ‘Whether he lies, or whether he tells the truth, he is wicked, and it is impossible for him to act, without acting against the laws of rectitude and the laws of conscience.’ If then it be found that the generally mild and just rules of the common law place the witness in this exquisite dilemma, between perjury on the one hand, and false swearing on the other, we must look to our own laws—to our constitution and bill of rights, which proclaim religious toleration and guarantee the free exercise of religious worship, and see if they do not view with a more liberal eye the religious feelings of our people, and dispense with a more equal hand the universal and immutable principles of Justice.

I shall consider this question in two aspects. 1. Upon authority, so far as adjudications in this country and England are to be found. 2. Upon principles of public policy, in connection with the guarantees furnished by our constitution in favor of religious liberty.

I. It is true as a general proposition, that every person is bound when called upon in a court of justice, to testify whatever he may know touching the matter in issue. This is essential to the proper administration of civil and criminal justice; but it does not follow that a priest is bound to disclose what a penitent confessed to him in the exercise of a religious rite, which forms a fundamental tenet in the church to which he belongs, and without which the church would lose its distinctive features in the estimation of those who profess its faith. The elementary writers state in the most unqualified terms that, clergymen of no religious persuasion are exempt from the operation of the rule, yet when we examine the references they cite, it furnishes no authority for the proposition. It is a little remarkable that the whole range of English reports furnish no case in which the question has arisen in respect to a Romish priest. This is a pregnant circumstance, and has strongly impressed me with the conviction, that the exemption of a Catholic priest is either a principle of law so well recognized there, that it has been deemed useless to make it the subject of adjudication, or that the relation of priest and penitent has been held so delicate and sacred, that no one had the hardihood to draw aside the veil, which conceals it from

public gaze. When I reflect that the Catholic church in that country has experienced every change of fortune, from the uncontrolled exercise of supreme power to the sufferings of an intolerant persecution, I can upon no other principle account for this utter absence of all authority on the point.

The only case cited by the elementary writers which seems to furnish authority for the proposition that clergymen of no religious persuasion, whether Protestant or Catholic, are exempt from disclosing confessions made to them, is a case reported in McNally, p. 253-255. In that case a bill was filed to recover the estates of the late Lord Dunboyne. The plaintiff claimed the same as heir at law, and alleged that the will under which the defendant claimed was a nullity, Lord Dunboyne having been a popish priest and having conformed and relapsed to popery, which deprived him of the power to make a will. Issue was joined, and the plaintiff called the Rev. Mr. Gahan, a clergyman of the church of Rome, to be examined, and interrogatories to the following effects were, amongst others, propounded to him. "What religion did the late Lord Dunboyne profess from the year 1783 to 1792? What religion did he profess at the time of his death and a short time before?" The witness answered to the first part, but objected to the second, and assigned as a reason for his refusal, that his knowledge of the matter enquired of, if any he had, arose from a *confidential communication* to him, in the exercise of his clerical functions, and which the principles of his religion forbade him to declare, nor was he bound by the laws of the land to answer.

Sir Michael Smith, the master of the Rolls, determined against the objection, and required the witness to answer. This case is relied on as a direct authority on the point, but a careful examination of it will show that the question does not arise and was not decided. It will be observed that the fact inquired into of Mr. Gahan had not been communicated to him in the administration of a sacrament of his church, which in its nature is to be kept inviolably secret. The information was not obtained in the confessional. It was a *confidential communication*, and the knowledge may have been derived by him from the ordinary sources of information, which daily association afforded.

He would not, therefore, be exposed by disclosing it, to degradation, breach of oaths, and a violation of clerical duties. It only affected his personal honor as a gentleman.

The point did not arise in this case, and the principle, which it is cited as authority to sustain, was not decided.

There are other cases cited in the elementary books, but an examination of them will show that they contain the mere loose dicta of judges upon the general question of exemption, when the precise point was not before them. Some of them in favor and others against extending the privilege to all clergymen.

In the case of *Broad vs. Pitt*, 3 C. & P. 518, Best, Chief Justice, said that "he, for one, would never compel a clergyman to disclose a communication made to him by a prisoner. But that, if he chose to disclose them he would receive them." In the case of *Du Barre*, Peake's Nisi Prius Cases, p. 77, Lord Kenyon, on being informed that Mr. Justice Buller had required a clergyman to disclose the confessions made to him by a prisoner, remarked, "I should have paused before I admitted the evidence here admitted." These opinions were expressed in respect to protestant clergymen, who do not hold such confessions to be sacred. But with how much more force do they apply in the case of Roman Catholic clergymen, according to whose religious creed, the confession is a sacramental rite.

So far then as the English authorities are concerned, the question has never been decided, and comes before me untrammelled by any English adjudication.

In the United States the question has been twice decided in favor of exempting a Roman Catholic priest from disclosing confessions made to him in this sacred relation.

The first case was an indictment for larceny. It was tried in the Court of General Sessions for the city of New York, before De Witt Clinton, Mayor, J. Ogden Hoffman, Recorder, and J. S. Douglass and R. Cunningham, sitting aldermen. The commonwealth, to sustain the prosecution, introduced as a witness the Rev. Mr. Kholman, the Catholic priest to whom the prisoner had confessed his guilt and delivered the goods to be returned to the owner. The witness upon being interrogated as to his knowledge of the transaction and the

connection of the prisoner with it, objected to answering, upon the ground that all his information was obtained in the confessional, and claimed to be exempt from making the disclosure. The question on his privilege of exemption was elaborately argued, and after having taken time to consider of their opinion, the court unanimously decided that the witness should not be compelled to answer the question, and that the priest was not bound to disclose what was confided to him in the confessional.

The same point was subsequently presented in another case before the same court, and decided in the same way. The question has never been adjudicated in any of the courts of last resort in the United States ; and the two decisions cited, whilst they are not binding as authority, are at least persuasive, and derive additional weight from the eminent and learned names connected with them.

Although there are no decisions in the higher courts of the United States affirming the principle that Catholic priests are privileged from disclosing what is made known to them in the confessional, yet they are privileged by express enactment in several of the States. By a statute of New York, 2 Rev. Stat. 496, § 72, it is enacted that "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character in the course of discipline enjoined by the rules or practice of such denomination." A similar statute exists in Missouri, Rev. Stat. 1845, ch. 186, § 19 ; and in Wisconsin, Rev. Stat. 1849, ch. 98, § 75 ; and in Michigan, Rev. Stat. 1846, ch. 102, § 85 ; and in other States of the Union ; and such is the law of Scotland. By a writer on Scotch Criminal Law it is remarked : "But our law utterly disowns any attempt to make a clergyman of any religious persuasion whatever divulge any confessions made to him in the course of religious visits, or for the sake of spiritual consolation, as subversive of the great object of punishment, the reformation and improvement of the offender." (Alison, C. L. S.)

II. Is this privilege embraced in the guarantees furnished by our Constitution in favor of religious toleration, and does it violate any principle of public policy. The Constitution of the United

States provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our Bill of Rights declares that, "religion, or the duty we owe to our Creator, and the means of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience;" and our Constitution enacts that, "no man shall be compelled to frequent, or support any religious worship, place or ministry whatsoever: nor shall any man be enforced, restrained, molested or burthened in his body, or goods, or otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess, and by argument to maintain their opinions in matters of religion, and the same shall in nowise affect, diminish, or enlarge their civil capacities."

It is impossible to conceive of more broad and comprehensive terms than are used in our Bill of Rights, and our State and Federal Constitutions. Religious toleration was the great purpose their framers had in view. They believed that it was the right of every human being to worship God according to the dictates of his own conscience. They designed to secure forever to all, the free exercise and enjoyment of religious profession and worship, and employed language commensurate with that object. At the time they adopted these constitutional provisions in favor of religious liberty, the Catholic religion was in existence and had been for centuries. Penance was one of its sacraments, and confession an essential part of that sacrament. They enacted these provisions with full knowledge of this fact, and must have intended that the Catholics should freely enjoy their religion, including auricular confession. If they had intended to restrict the Catholics in their mode of worship, to deprive them of the sacramental confession, and thus strike out a fundamental tenet in their creed, would they not have used some words of limitation on the broad and comprehensive terms they employed? By every rule of construction, I am forced to conclude that they would have imposed this restraint if they had intended to do so. If, then, the common law rule of evidence, which requires a witness to disclose all he may know touching a matter in issue

before a court of justice, infringes upon that free exercise of religious worship, which the Bill of Rights proclaims and the Constitution guarantees, no one will deny but that the rule of evidence must yield to the constitutional enactment. Being a rule of evidence in existence at the time of the adoption of the Constitution, it is repealed by any provision in the Constitution with which it comes in conflict; and the inquiry then is, does this rule of evidence restrict those who profess the Catholic religion in the free exercise of their religious rights and privileges? In making this inquiry we must ever keep in mind that it is essential to the free exercise of a religion, that its ordinances and ceremonies should be administered, and those who observe them should be protected; and that the sacraments of a religion are its most essential elements. What then would be the consequence to the Catholic religion of requiring the priest to disclose what is entrusted to him in the sacramental confession? Would any such confessions be made? Clearly not. No criminal would seek the confessional, and in the act of penance make known his crime, if the priest to whom he discloses it, is liable to be called as a witness to testify on his trial and insure his conviction. These confessions, which are now delivered in secret for a purpose purely religious, would not be so delivered, but would be withheld for fear lest they should be used for a judicial purpose. The rule of evidence which would enforce the disclosure of confessions made to a priest, would operate as a prohibition of all such confessions for spiritual purposes as could be used for judicial purposes; and this prohibition would be secured by whatever consequence of a penal character would result from the decision, which such testimony would warrant. Penitents would be pressed by the whole weight of the penal branch of the law, and be prohibited from the exercise of this essential and indispensable part of their religion in confessing all such misdeeds as, if judicially disclosed, would have the effect of drawing upon them the punishment of the law. The consequences to the priest would be equally oppressive. To him it would be little short of persecution. What priest would receive the confession of a penitent, when the dilemma in which he would be placed is so terrible? When brought to the witness stand, he must

either violate the oath administered to him by giving false testimony, or by disclosing what he has received in the confessional, violate the ecclesiastical oath administered at the time of his ordination, or by his silence be "burthened in his body" by commitment for contempt. Is it not manifest that, neither the priest will administer the sacrament of penance, of which the confession is an essential part, nor will the penitent receive it, when both are liable to such terrible consequences? And if this restraint be imposed upon them, can they be said to enjoy the free exercise of their religion, being denied the right to partake of one of its sacraments? In the Protestant church there are but two sacraments—Baptism and the Lord's Supper. They are essential to the full enjoyment of that faith. Now suppose that a decision of this court, or a law of this State, or a common law rule of evidence, should prevent the administration of one or both of these sacraments, would not the Constitution be violated and the freedom of religion be infringed? and must not the same privilege apply to the Catholic church? Any law, or rule of evidence, which prevents the administration of any one of its sacraments to those who profess its creed, is equally a violation of the Constitution, and a denial to them of the free exercise of that religious freedom which the Constitution secures alike to all.

Nor will this prohibition upon the free enjoyment of the Catholic religion, by requiring its ministers to testify as to what may be disclosed to them in the confessional, be confined in its operation in cases of crime. It will extend to civil proceedings; and every suitor, whose adversary is a Catholic, and whom he suspects of having made disclosures in the confessional, touching the subject of controversy between them, will have the right to bring the priest into court to testify to matters confided to him in that sacred relation. The alarm which this practice would create among that class of our people would be intense, and to them a most extreme and afflictive grievance. And thus those who profess this faith, will be subjected to a species of apprehension, and of petty annoyance and vexation, utterly inconsistent with the enlarged and enlightened toleration of our laws.

Nor will any principle of public policy be violated by extending

this privilege of exemption to the Catholic clergy from testifying to matters made known to them in the sacramental confession. The advantage gained in promoting the ends of criminal justice by coercing a disclosure from the priest would be of rare occurrence. And whilst cases may be supposed in which the concealment of a fact communicated in penance might have a pernicious effect, yet such instances are rare, and furnish no foundation for the rule that they should be required to disclose in all cases. It has been truly said, that "to attempt to establish a general rule, or to lay down a general proposition from accidental circumstances, which occur but rarely, or from extreme cases, which may sometimes happen in the infinite variety of human actions, is totally repugnant to the rules of logic and the maxims of the law. The question is not whether penance may sometimes communicate the existence of an offence to a priest, which he is bound by his religion to conceal, and the concealment of which may be a public injury, but whether the natural tendency of it is to produce practices inconsistent with the public safety," and whether public policy requires the disclosure? To require such disclosure from the priest would be to declare, as I have already shown, that there should be no penance and no confession. For who would confess, when the sanctity of the sacrament of penance is to be invaded and its secrets exposed to public gaze? To enforce the rule of evidence which requires such disclosures, would be to destroy the source itself of all such evidence—and the supposed public benefit would share the same fate—and thus the rule would defeat itself, whilst the effort to enforce it would inflict a grievous, continuous and unconstitutional injury on those to whom it is sought to be applied.

It can scarcely be necessary to notice the argument which was pressed, that this exemption of Catholic clergymen would be extending to them a privilege not enjoyed by clergymen of the Protestant persuasion. No Protestant claims any such exemption, and they cannot be said to be denied that which they lay no claim to. Penance and the confessional form no part of their religious creed. They repudiate both. When this rule of evidence, or any other principle of law, shall deprive Protestants of one of the sacraments

of their church, and thus deny to them the "free exercise of their religion according to the dictates of conscience," they should be held exempt from the operation of any such rule, or principle of law. But until such is shown to be the case, there is no analogy between Protestants and Catholics on this question—such an argument is rather more popular than logical; and though it may be invoked to excite prejudice, should never be allowed to disturb the judgment.

This privilege of withholding what is made known in the confessional is not without analogy in the law to sustain it. It belongs to every attorney or counsellor at law. All professional communications made to attorneys by clients are privileged, and no human power can compel the attorney to disclose them. Whether he be called as a witness, or be made a defendant, and a discovery sought from him as such, by bill in Chancery, whatever he has learned as counsel or attorney, he is not obliged nor permitted to discover; and by the attorney's withholding such knowledge the innocent may suffer the extreme penalties of the law and the guilty go unwhipt of justice. "The foundation of this rule" said Lord Chancellor Brougham, in the case of *Greenhough vs. Gaskell*, 1 My. and K. 102, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations, which form the subject of all judicial proceedings." If such communications were not protected, no man, as the same learned judge remarked in another case, would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into court, either to obtain redress or to defend himself. With how much more force does such reasoning apply to those who seek the aid of spiritual advisers, and whose religious creed attaches essential importance to their interposition.

It will be observed that I have not discussed this as a theological question. Whether it be, as alleged, of divine origin or not;

whether repentance and consequent abstinence from future misdeeds of the like nature, followed by satisfaction more or less adequate for the past, are temporal advantages quite as extensive as the good effects to be derived from the disclosure as an aid to the administration of justice, are views which I shall not enlarge upon. But assuming penance and confession to be a sacrament in the Catholic church, and a tenet of faith essential to the maintenance of that religion, I have considered it in its legal and constitutional bearings. And in every aspect in which I have been able to view it; looking at it as analogous to the rule which exempts attorneys from disclosing the professional communications of their clients entrusted to their confidence; to the fact, that in England during centuries while the Catholic religion prevailed there no case can be found in which the disclosure was coerced; that it is the law of Scotland, as it is the law in several States of this Union, by express statutes to exempt the priest from disclosing information obtained in the confessional; that no principle of public policy will be invaded; and above all, that the great constitutional boon of religious toleration, which secures to all the "free exercise of religion according to the dictates of conscience," cannot be enjoyed by this class of our people if the secrets of the confessional are to be disclosed, I shall hold the priest exempt from testifying as to what was confessed to him by the deceased in the administration of the sacrament of penance.

Court of Chancery, Mobile, Ala., Oct. 1855.

THE MARINE DOCK AND MUTUAL INS. CO. vs. JOHN H. GOODMAN, JAMES A. MOORING, DUKE W. GOODMAN, THE FULTON INS. CO., THE FRANKLIN INS. CO.

1. An insurer is liable for a total loss only where an abandonment has been made and actually or constructively accepted, or where there has been in fact an actual or technical total loss. The doctrine of some decisions, that he can be made thus liable by reason of even the "highest probability" of an actual or technical loss, without acceptance of an abandonment, *held* to be unsound.